Petition

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

RAYMOND W. BASZNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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THE QUESTIONS PRESENTED FOR REVIEW

1. Is the Office of the United States Attorney entitled to a special exemption from the application of the ethical standards of the legal profession?

The Petitioner submits that the U. S. Attorney's office should not be specially exempted.

2. Is a District Court's Order denying disqualification of counsel in a criminal case appealable under 18 U.S.C. §1291?

The Court of Appeals ruled that it was not. The Petitioner submits that such an interlocutory order is appealable.

REASONS FOR GRANTING THE PETITION

1. The Court of Appeals for the Sixth Circuit decided an important question of federal law concerning the appealability of an order denying disqualification of counsel in a criminal case. This question has not been, but should be, settled by this Court. This Court specifically reserved this question in its recent opinion in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. ——, 66 L.Ed. 2d 571 (1981) at 577, footnote 8:

> "Neither do we express any view on whether an order denying a disqualification motion in a criminal case would be appealable under §1291."

Petitioner, Raymond W. Baszner, respectfully prays that a writ of certiorari issue to review the judgment of the

United States Court of Appeals for the Sixth Circuit entered in this case on September 17, 1981.[1]

2. The Court of Appeals for the Sixth Circuit decided an important question of federal law concerning disqualification of a prosecutor's office due to a conflict of interest. This question, which has never been addressed by any federal court in a reported decision, is one of first impression which should be settled by this Court.

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[1]The appeal (81-5021) was consolidated by the Court of Appeals for argument and opinion with a mandamus action (**Baszner**, 81-5182) and with the co-defendants' cases (**Caggiano**, No. 81-5002 and **Winfield**, No. 81-5022).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

REASONS FOR GRANTING THE PETITION i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT:

I. The Sixth Circuit's Opinion in effect exempted the United States Attorney's Office from the general rule of disqualification where a conflict of interest exists. This ruling should be reversed because of the danger of prejudice to the petitioner and his co-defendants. 5

A. The presence in the U. S. Attorney's Office of a lawyer who represented a defendant at an earlier trial of the same charges creates a presumption of prejudice. 6

B. The Code of Professional Responsibility, and the ethics opinions of the American Bar Association and the Supreme Court of Tennessee support the petitioner's position that the U. S. Attorney's Office should be disqualified from prosecuting the petitioner. 10

C. The United States Attorney's Office should not be exempted from the disqualification standards to which a private law firm is held. 15

Page

II. The Sixth Circuit's opinion that it does not have appellate jurisdiction to hear an appeal of a District Court's Order denying disqualification under 28 U.S.C. §1291 should be reviewed by this Court. 16

A. The order denying disqualification is appealable under 28 U.S.C. §1291. 16

B. This Court can properly rest appellate jurisdiction on the fact that the Court of Appeals should have granted the Petition for Mandamus or accepted jurisdiction under the "Umbrella of the Government's Appeal." 20

CONCLUSION 23

APPENDIX "A" — Order of United States District Court from which this appeal is taken, filed December 24, 1980 ... A-1

APPENDIX "B" — Decision of the United States Court of Appeals for the Sixth Circuit, dated September 17, 1981 ..... A-11

APPENDIX "C" — Order of the United States Court of Appeals for the Sixth Circuit Denying Petitions for Rehearing A-28

APPENDIX "D" — Board of Professional Responsibility of the Supreme Court of Tennessee Formal Ethics Opinion Number 81-F-S A-30

TABLE OF AUTHORITIES

CASES: Page

Cheng v. GAF Corporation, 631 F.2d 1052 (2nd Cir. 1980) 7

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 19

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. ——, 66 L.Ed. 2d 571 (1981) 1, 16, 21

General Electric v. Valeron, 608 F.2d 265 (6th Cir. 1979) 6

Gov't of India v. Cook Industries, Inc., 569 F.2d 737 (2nd Cir. 1978) 7

In re April 1977 Grand Jury Subpoenas, General Motors Corporation v. United States, 584 F.2d 1366 (6th Cir. 1978) 18

In re Multi-Piece Rim Products Liability Litigation, 612 F.2d 377 (8th Cir. 1980), vacated and remanded in *Firestone v. Risjord*, 449 U.S. ——, 66 L.Ed. 2d 571 ..... 9, 22

Melamed v. Continental Baking Co., 592 F.2d 290 (6th Cir. 1979) 22

MPL, Inc. v. William Cook, et al, 498 F. Supp. 148 (N.D. Ill. 1980) 8

Novo Therapeutisk v. Baxter Travenol, 607 F.2d 186 (7th Cir. 1979) 6

State of Arkansas v. Dean Foods, 605 F.2d 379 (8th Cir. 1979) 9

Page

State v. Burns, 322 S.W.2d 736 (Mo. 1959) 15

State v. Chambers, 86 N.Mex. 383 524 P.2d 909 15

State v. Latigue, 108 Ariz. 521, 502 P.2d 1340 (1972) (en banc) 14

State v. Leigh, 178 Kan. 549, 289 P.2d 774 (1955) 15

United Sewerage Agency of Washington County, Oregon v. Jelco, Inc., 49 LW 2782 (9th Cir. 1981) 21

United States v. Moody, 485 F.2d 531 (3rd Cir. 1973) 21

STATUTES:

28 U.S.C. §1291 ..... 2, 15

MISCELLANEOUS:

American Bar Association Formal Opinion 342, 62 A.B.A.J. 517 (1976) 10, 12

American Bar Association Standards for Criminal Justice, §1.1(c) (Approved Draft) 18

American Bar Association Standards for Criminal Justice, §1.2 (Approved Draft) 18

Board of Professional Responsibility of the Supreme Court of Tennessee, Formal Ethics Opinion No. 81-F-5 12

CODE OF PROFESSIONAL RESPONSIBILITY:

Canon 1 13

Canon 9 13

Disciplinary Rules:

DR 1-102(A)(5) 14

DR 2-110(B)(2) 14

DR 4-101(B) 11, 14

DR 5-105(D) 1, 13, 14

DR 9-101(B) 11

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The decision and order of the United States District Court for the Western District of Tennessee is reproduced in the Appendix (App. at 1). The decision and order of the United States Court of Appeals for the Sixth Circuit, dated September 17, 1981, and not yet reported, is reproduced in the Appendix (App. at 11), as is that court's denial of the Petitions for Rehearing En Banc entered on October 23, 1981 (App. at 28).

JURISDICTION

The opinion of the Court of Appeals was entered on September 17, 1981, and the Order Denying the Petition for Rehearing En Banc was entered on October 23, 1981.

Jurisdiction is conferred on this Court by 28 U.S.C. §1254 (1) (1976).

STATUTE INVOLVED

This case involves the interpretation and application of 28 U.S.C. §1291 as it applies to the appeal of a denial by a District Court of a motion for disqualification of counsel in a criminal case. That statute provides as follows:

> §1291. Final decisions of district courts.
>
> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

The petitioner, Raymond Baszner, and his co-defendants were indicted by the grand jury for the United States District Court for the Western District of Tennessee. The issues involved in the indictment were tried, but the jury was unable to resolve the issues and deadlocked; a mistrial was declared.

At the time of the trial, the defense attorney for the co-defendant Caggiano was Phil M. Canale, Jr. All of the defendants and all of their attorneys consulted and conferred with each other before and during the trial; joint strategy sessions were held and confidences exchanged. A joint defense was presented. In addition to representing the co-defendant, Mr. Canale actually represented this peti-

tioner in the latter part of the jury trial. The government was represented by the United States Attorney's Office for the Western District of Tennessee.

After the mistrial was declared and before the case was set for retrial, Mr. Canale became an Assistant United States Attorney for the Western District of Tennessee, the same office which prosecuted the petitioner and his co-defendants. He is still practicing law as an Assistant U. S. Attorney.

The petitioner filed a Motion to Disqualify the Office of the United States Attorney for the Western District of Tennessee because of the conflict of interest which existed. The other defendants joined in that motion. The District Court granted the joint motion in part and denied it in part; the United States Attorney's Office was disqualified from participating in the prosecution of Caggiano, but was not disqualified as to this Petitioner and his other co-defendant.[2] An appeal to the Sixth Circuit followed.[3]

In an opinion filed on September 17, 1981, the panel held that the Court of Appeals had no jurisdiction to hear the appeals of Baszner and Winfield under 28 U.S.C. §1291. The petitioner and his co-defendants filed Petition for Rehearing En Banc, which were denied in an order entered on October 23, 1981.[4]

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[2]The District Court attempted to certify the question for an interlocutory appeal, believing that the issue was, or should be immediately appealable as a critical, final order.

[3]The government appealed the District Court's order of disqualification as to Caggiano and both Baszner and Winfield appealed the denial of the motion to disqualify as to them.

[4]The government also petitioned the Court of Appeals to clarify its order; this petition was also denied.

The Court of Appeals held that a District Court order denying a motion to disqualify the United States Attorney's office in a criminal case because of a conflict of interest is not a final appealable order under 28 U.S.C. §1291. The Court also held that it had jurisdiction of the government's appeal of the District Court's order disqualifying the United States Attorney's Office and reversed the order of disqualification in regard to the petitioner's co-defendant Caggiano.

REASONS FOR GRANTING THE WRIT

I

The Sixth Circuit's Opinion in effect exempted the United States Attorney's Office from the general rule of disqualification where a conflict of interest exists. This ruling should be reversed because of the danger of prejudice to the petitioner and his co-defendants.

Although the Court of Appeals did not reach the merits of the petitioner's argument, it did hold that the United States Attorney's Office for the Western District of Tennessee was improperly disqualified with regard to Mr. Caggiano's prosecution and implied that the same result would have been reached for appellants Baszner and Winfield if the merits of their cases had been decided.

When a lawyer clearly has a conflict of interest and cannot participate in the further handling of a case, the law firm with which he is associated is also disqualified. Code of Professional Responsibility, Disciplinary Rule 5-105(D) which states:

> If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.

When that "law firm" is the United States Attorney's Office, that office is not entitled to an exemption from the general rule of disqualification. No one has disputed that Mr. Canale, the Assistant U. S. Attorney, who formerly represented the petitioner's co-defendant on the same charges as the present case, should be disqualified from any

participation in the government's case against the petitioner and his co-defendants. The Court of Appeals, however, found that because Mr. Canale is being screened from participation in the prosecution and because Caggiano did not demonstrate to the District Court any actual prejudice, there was no need to disqualify the other members of the U. S. Attorney's Office for the Western District of Tennessee from the prosecution.

A. The presence in the U. S. Attorney's Office of a lawyer who represented a defendant at an earlier trial of the same charges creates a presumption of prejudice.

If an attorney represents one party and subsequently represents that party's adversary, the attorney will be disqualified if it is shown that "the matters embraced in the pending suit are *substantially related* to the matters or cause of action wherein the attorney previously represented [the party]." *General Electric v. Valeron*, 608 F.2d 265 (6th Cir. 1979). See also *Novo Therapeutisk v. Baxter Travenol*, 607 F.2d 186 (7th Cir. 1979). Without a doubt, the matters in the present prosecution and the matters in the prior prosecution which resulted in a mistrial meet this "substantial relationship" test. Satisfaction of this test raises the presumption that confidential information was received by Mr. Canale. Although there is question whether this is an irrebuttable or a rebuttable presumption *G.E. v. Valeron*, supra, that question is not pertinent here since the government has not even contested the fact that Mr. Canale was the recipient of confidences from his client, that he participated in joint strategy sessions with co-defendants and their counsel during the trial, or that he

actually represented this petitioner in the latter stages of the trial.

Once the receipt of confidential information is acknowledged, the Court must then determine whether the disqualification of Mr. Canale forecloses the participation of other members of the U. S. Attorney's Office. The Sixth Circuit's standard was that, absent the petitioner's proof of actual prejudice, there need not be a disqualification. The petitioner submits that this would place an impossible burden on the party seeking the disqualification.

The Court of Appeals noted that "no prejudice had resulted to anyone" (App. at 26), overlooking the fact that such prejudice is presumed. As the Second Circuit ruled,

> . . . one of the purposes of disqualification is "to guard against the danger of *inadvertent* use of confidential information" (citing cases). [Emphasis added]
>
> *Cheng v. GAF Corporation,* 631 F.2d 1052, 1057 (2nd Cir. 1980).
>
> See also *Gov't. of India v. Cook Industries, Inc.,* 569 F.2d 737 (2nd Cir. 1978).

Another reason why the Sixth Circuit's standard is incorrect is that it would require the moving party to disclose the same confidences he wishes to keep secret from the prosecution. In order to prove prejudice, the petitioner would have to reveal and prove what confidences had been made to Mr. Canale.

As noted in *Cheng v. GAF Corp.,* 631 F.2d 1052 (2nd Cir. 1980), at 1056:

> It is well established that a court may not inquire

> into the nature of the confidences alleged to have been revealed to the tainted attorney. To require proof of access to privileged information would "put the former client to the Hobson's choice of either having to disclose his privileged information in order to disqualify his former attorney or having to refrain from the disqualification motion altogether." (Citing cases)

The fact remains that Mr. Canale represented Mr. Caggiano during the first trial and that he continued to represent him in the preliminary proceedings leading to the retrial until his formal appointment as an Assistant U. S. Attorney. This petitioner, Baszner, also had close contact with Mr. Canale, who, together with Mr. Baszner's attorney, prepared the defense strategy at the first trial. It is imperative, in that situation, for all parties to be open with each other. Not only was Mr. Canale part of the joint defense of the co-defendants, he also actually was Mr. Baszner's attorney in the later stages of the first trial. The Sixth Circuit noted in its opinion:

> Specifically, Canale on behalf of Caggiano and Baszner, had joined in a motion for a mistrial and renewed an earlier motion for a judgment of acquittal when Baszner's attorney was absent during deliberations. . . .
>
> App. at 17.

The petitioner submits that the proper approach was stated by District Judge Shadur of the Northern District of Illinois in the case of *MPL, Inc. v. William Cook, et al*, 498 F. Supp. 148, 149 (1980):

> "One of the salient features of the approach taken

> by the Code of Professional Responsibility in lawyer disqualification matters is that courts will not inquire into the *facts* of disclosure or non-disclosure of confidences and secrets by the lawyer. This is at the root of the concept of "infectious disqualification." It would undercut the whole structure of the lawyer-client relationship if the existence and nature of communications between lawyer and client could be inquired into for purposes of deciding disqualification motions. The price that must be paid is that disqualification often follows from the *appearance* and not the *fact* of impropriety [emphasis in original, footnotes omitted].

The Eighth Circuit Court of Appeals, in *State of Arkansas v. Dean Foods,* 605 F.2d 380 (1979) disqualified the staff of an assistant attorney general who had a conflict of interest in the subject litigation. The case was a civil antitrust action brought by the state; the assistant attorney general who was representing the state had previously been associated with the firm representing the defendant and had done work for the defendant on a matter which was substantially related to the present suit. The Eighth Circuit held that not only the one lawyer, but his staff who had worked with him on the case should be disqualified. This decision was based strictly on Cannon 9's injunction against the appearance of impropriety. *Id.* at 387. Although the Eighth Circuit has overruled the *Dean Foods* case with regard to the appealability of disqualification orders, *In re Multi-Piece Rim Products Liability Litigation, Firestone Tire and Rubber v. Risjord,* 612 F.2d 377 (8th Cir. 1980), vacated and remanded 449 U.S. ——, 66 L.Ed. 2d 571 (1981),

the reasoning of the Court of Appeals and its holding in regard to disqualification remain sound.

Another reason why the Court of Appeals was incorrect in its assertion that the party moving for disqualification must prove actual prejudice is that the movant would be required to prove a disclosure by the former attorney. An inadvertent disclosure could be made in a criminal prosecution such as this, even given the screening procedures and the good faith of the parties involved. Once the disclosure is made, the damage has been done. The criminal defendant would find it difficult, if not impossible, to prove actual prejudice in a situation such as this, even if a disclosure had been made. The petitioner is prejudiced simply by the presence of his co-defendant's former attorney in the prosecutor's office.

The U. S. Attorney's Office should not be given a special exemption for purposes of disqualification. When Mr. Canale was hired, everyone involved knew of his representation of Mr. Caggiano, the petitioner's co-defendant, and knew that a conflict existed. The U.S. Attorney's Office assumed the risk that it might be disqualified, just as a private law firm assumes the same risk when hiring an experienced attorney.

B. The Code of Professional Responsibility, and the ethics opinions of the American Bar Association and the Supreme Court of Tennessee support the petitioner's position that the U.S. Attorney's Office should be disqualified from prosecuting the petitioner.

The Court of Appeals relies almost entirely on the American Bar Association's Formal Opinion 342, 62

A.B.A.J. 517 (1976). The Court construed the opinion to state that DR 5-105(D) was inapplicable to other government lawyers associated with a particular government lawyer who is himself disqualified by reason of DR 4-101, DR 5-105, DR 9-101(B), or similar disciplinary rules.

It is the position of the appellant that the Sixth Circuit's reliance upon this ABA opinion is misplaced. ABA Formal Opinion 342 was addressed, not to the situation of the petitioner, but to the question of disqualification of a private law firm when it hires a lawyer who has just left government employment. Specifically, the opinion was to "interpret DR 9-101(B) . . . ," which reads:

> A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

The portion of the ABA opinion relied upon by the panel is thus, in judicial terms, purely dictum. Further, the ABA opinion grounded its conclusion concerning disqualification on two factors; the establishment of a screening system to isolate the tainted attorney, and waiver of the conflict by the government agency, which was the attorney's former client:

> Accordingly, it is our opinion that whenever the government agency is satisfied that the screening measures will effectively isolate the individual lawyer from participating . . . and that there is no appearance of significant impropriety affecting the interest of the government, *the government may waive the disqualification of the firm* . . . [emphasis added]

ABA Formal Opinion 342, 62 A.B.A.J. 517.

Neither the petitioner nor the other defendants have waived the conflict of interests but have specifically objected to it. They are not satisfied that the screening mechanism will be effective, and they are concerned with the appearance of impropriety as it concerns their interests.

The Court of Appeals' decision did not mention or discuss the Formal Ethics Opinion of the Board of Professional Responsibility of the Tennessee Supreme Court, which licenses and governs all Tennessee attorneys, including those in the U. S. Attorney's Office. Formal Ethics Opinion No. 81-F-5, issued by the Tennessee Board in April, 1981 (App. at 30) is on point in the instant case. In that matter, a plaintiff's personal injury lawyer wanted to join a personal injury defense firm

> "which is defending all seven of the personal injury cases which the attorney has been prosecuting."

A "Chinese wall" was to be built between the attorney and the rest of the lawyers in his new firm; he would be completely screened from and take no part in any of the cases.

The Ethics Committee ruled that his new association would disqualify not only the individual attorney with the conflict of interest but the entire firm as well:

> When an attorney is barred from representing on the grounds of knowledge actually or presumably acquired from a former representation, then his entire firm is similarly barred.
>
> Even though the attorney did not participate, with his new firm, in any of the cases which he

> had previously been handling on the other side, the potentiality of his revealing confidential information to his new partners, and the justifiable apprehension of his former clients that he might do so, would be sufficient to disqualify the new firm.

The appellant Baszner states that this Formal Ethics Opinion should be most persuasive in the case at bar.

The cases which vicariously disqualify the United States Attorney's Office are grounded in the principals contained in the Code of Professional Responsibility. Canon 9 of the Code states, "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." The significance of this standard is its emphasis on *appearances*. This evidences a concern not only for the protection of the individual, but principally for the reputation of the legal system as a whole. Buttressing this idea is Canon 1 which provides, "A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession."

Disciplinary Rule 5-105(D) sets forth the requirements for vicarious disqualification:

> "If lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."

If a lawyer is required to withdraw from employment because of a conflict with a Disciplinary Rule, no one professionally associated with this lawyer can continue involvement in the matter. Although this Rule refers specifically to the lawyer's "firm," the language and spirit

of the rule extends to a prosecutor's office as well. The Rule disqualifies a "partner, . . . associate, or any other lawyer affiliated with him . . . ." Clearly, the intent of this language is to disallow anyone affiliated with a lawyer to to continue employment once that attorney is barred because of a Disciplinary Rule.

Disciplinary Rule 2-110(B)(2) requires the attorney to withdraw if "he knows or it is obvious that his continued employment will result in a violation of the Disciplinary Rule." In terms of what types of conduct the Disciplinary Rules prohibits, DR 1-102(A)(5) states, "a lawyer shall not . . . engage in conduct that is prejudicial to the administration of justice." In addition, Disciplinary Rule 4-101(B) states: "except when permitted under DR 4-101 (C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client."

When construed together, these rules require an attorney to withdraw if his continued employment will prejudice or appear to prejudice the administration of justice. The rules further counsel the avoidance of the appearance of impropriety. The continued prosecution by the United States Attorney's Office for the Western District of Tennessee, under these circumstances, invites doubt and distrust of the integrity of the administration of justice. Under these circumstances, then, the withdrawal is required by DR 2-110(B), and DR 5-105(D), disqualifies "any other lawyer affiliated with him."

The Eighth Circuit's holding in *State of Arkansas v. Dean Foods*, 605 F.2d 380 (1979) and the state courts' holdings which call for vicarious disqualification properly interpreted the ethical standards involved. *See State v.*

Latigue, 108 Ariz. 521, 502 P.2d 1340 (1972) (en banc); *State v. Leigh*, 178 Kan. 549, 289 P.2d 774 (1955); *State v. Burns*, 322 S.W.2d 736 (Mo. 1959); *State v. Chambers*, 86 N.Mex. 383, 524 P.2d 909.

The court in *State v. Latigue*, for example, stated that the government's defense of no communications between the disqualified attorney and the rest of the office was not adequate:

> Even though there is [sic] no revelations by the attorney to his colleagues, the defendant will never believe that. Justice and the law must rest upon the complete confidence of the thinking public and to do so they must avoid the appearance of impropriety. Like Caesar's wife, they must be above reproach.
>
> 502 P.2d at 1342.

C. The United States Attorney's Office should not be exempted from the disqualification standards to which a private law firm is held.

The opinion of the Court of Appeals asserts that the U. S. Attorney's Office is somehow different from a private law firm when it comes to disqualification motions because salaried governmental employees do not have a financial stake in the success of their representation. This is also true of salaried associates in larger law firms; although good work may bring about professional rewards, it does not, in most cases, directly cause the associate to make more money. Yet, extensive work on a case by an associate in a private law firm who subsequently changes positions could cause disqualification of his new firm if a conflict

exists. The government's brief cites the burden disqualification would put on it to prepare a new prosecutor. Disqualification to avoid a conflict of interest is not more burdensome to the government than it would be to a defendant whose attorney was disqualified on the same grounds, especially when the prosecutor's office knew of the conflict when the attorney was hired and assumed the risk of disqualification. The U .S. Attorney's Office should not be granted a special exemption from the application of the ethical standards of the legal profession.

The petitioner submits that the burden placed on the petitioner by the Court of Appeals is not proper and this Court should accept this Petition for Writ of Certiorari to decide the proper standards for disqualification.

II

The Sixth Circuit's opinion that it does not have jurisdiction to hear an appeal of a District Court's Order denying disqualification under 28 U.S.C. §1291 should be reviewed by this Court.

A. The order denying disqualification is appealable under 28 U.S.C. §1291.

The Court of Appeals cites several cases which hold that, in a civil action, an order denying a disqualification motion is not appealable. The present case is not a civil lawsuit, but is a criminal prosecution. Although this Court in *Firestone Tire & Rubber v. Risjord,* supra, held that an order denying a disqualification motion in a civil case is not appealable under 28 U.S.C. §1291, it specifically left open the issue of appealability in a criminal case:

> Neither do we express any view on whether an

> order denying a disqualification motion in a criminal case would be appealable under §1291.
>
> *Id.* at p. 577, Note 8.

This Court should grant certiorari of the present case to determine the question which was specifically left undecided in *Firestone*.

The opinion of the Sixth Circuit applies the *Firestone* result to a criminal case without full discussion of the differences which exist between civil and criminal actions. The panel, in denying jurisdiction, simply states, in a footnote, that:

> We discern no reason why the result should be different in a criminal proceeding. The requirements of §1291 are to be applied in the same manner and, if anything, the policy of avoiding piecemeal and unduly protracted litigation weighs more heavily in a criminal proceeding than it does in a civil action.
>
> App. at 27, note 7.

The *Firestone* decision does not deprive an appeals court of jurisdiction to hear the merits of this criminal case; an order denying the disqualification of the U. S. Attorney's Office in a criminal case should be subject to even closer judicial scrutiny than an order in a civil case.

This distinction concerning motions to disqualify in civil and criminal litigation recognizes the essential difference between an attorney's representation of a private litigant and the United States Attorney's representation of the United States government in a criminal prosecution. In this latter situation, the proprieties of the legal system

shift to preserve the defendant's right to a fair trial. The function of the prosecution is to seek justice, not merely to convict. A.B.A. Standards for Criminal Justice, §1.1 (C) (Approved Draft.) In this regard, the prosecution must avoid the reality of or even the appearance of impropriety with respect to his duties. *Id.* at §1.2. When there is a legitimate claim that a criminal defendant is being deprived of a fair trial, the potential harm flowing from this deprivation injures both the defendant at trial and the legal system as a whole.

The panel also cited *In re April 1977 Grand Jury Subpoenas, General Motors Corporation v. United States*, 584 F.2d 1366 (6th Cir. 1978) as a basis for questioning its jurisdiction to hear this appeal. This case arose out of a 1977 grand jury tax fraud investigation of General Motors. In April, 1977, the Attorney General appointed an Internal Revenue Service lawyer to assist the Justice Department in conducting the Grand Jury's investigation. General Motors moved to disqualify the Internal Revenue Service attorney and the District Court denied the motion. General Motors appealed the denial and the Sixth Circuit held that it lacked jurisdiction under 28 U.S.C. §1291 to consider the appeal.

In re Grand Jury Subpoenas is distinguishable from the present situation. First, its holding concerns only the appealability of issues raised in a grand jury proceeding; it has never been cited for attorney disqualification outside the grand jury setting. In addition, in a grand jury proceeding, the moving party can refuse to obey the grand jury subpoena on the ground of the conflict of interest and appeal a resulting contempt citation. This alternative is not available to the defendant in a criminal case.

It is the petitioner's contention that the case at bar falls within the "collateral order" doctrine embodied in *Cohen v. Beneficial Industrial Loans Corp.*, 337 U.S. 541 (1949). In holding that the appeal in *Cohen* was proper, the Court stated:

> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than technical construction. . . . We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.
>
> *Id.* at 546-47.

In allowing the *Cohen* appeal, the Supreme Court identified several factors which, in its view, rendered the District Court's order "final," within the meaning of §1291. First, the District Court order had fully disposed of the question of the state security statute's applicability; in no sense did it leave the matter "open, unfinished and inconclusive." *Id.* Second, the decision was not simply a "step towards final disposition of the merits of the claim which would be merged in final judgment." *Id.*

In applying these factors to the case at bar it is obvious that the first two requirements are met: the denial of the motion to disqualify is closed, and it is collateral and unrelated to the underlying litigation. The problem, if any,

arises in meeting the final test: whether this decision involved an important right which would be "lost" if review had to await a final disposition on the merits. While it is true that this defendant can raise the question after the trial on the merits, this delay will cause prejudice to the defendant and to the judicial system as a whole. If the appeal must await a decision on the merits, the defendant runs the risk of inadvertent or deliberate disclosure by Mr. Canale of confidential information to his colleagues in the United States Attorney's Office. Coupled with this potential for actual prejudice to the defendant, the legal system as a whole would suffer if the appeal is delayed until the disposition on the merits.[5] For whether this information is disclosed or not, it is unseemly for the coercive arm of government to compel this defendant to stand trial when the prosecution is tainted with a conflict of interest. The American criminal justice system requires the confidence of both the accuser and the accused in the availability of a fair trial, free from any lingering doubts about the propriety of the prosecution.

B. This Court can properly rest appellate jurisdiction on the fact that the Court of Appeals should have granted the Petition for Mandamus or accepted jurisdiction under the "Umbrella of the Government's Appeal."

Assuming, arguendo, that the Court of Appeals was correct in declining to accept jurisdiction of this appeal under 28 U.S.C. §1291, the Court of Appeals should have accepted jurisdiction either under the umbrella of the

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[5]The District Court attempted to certify this question as a final, appealable order, recognizing that it is a case of first impression in the Federal system and that the matter needed to be resolved prior to another lengthy trial.

government's appeal or by granting the appellant's Petition for a Writ of Mandamus.

In a criminal case where the defendant is not allowed to appeal a ruling of the District Court, but the government's appeal is allowed on the same set of issues, the defendant should be allowed to raise the questions he would not otherwise be allowed to pursue. *United States v. Moody*, 485 F.2d 531 (3rd Cir. 1973). That case involved a defendant's motion to suppress evidence which ordinarily is not appealable as a final order under 28 U.S.C. §1291. The government, however, had appealed the decision of the trial court excluding other evidence. The Third Circuit held that so long as the same issues were raised, the defendant's appeal could be heard under the "umbrella of the government's appeal." Supra at 534. The present case is the same as *Moody*. The District Court's order was appealable by the government; the issues to be decided are the same in regard to both appeals of the disqualification order. The appeal should have been allowed under the "umbrella of the government's appeal."

The Court should also have granted the appellant's Petition for Writ of Mandamus. This remedy is available after the decision in *Firestone Tire and Rubber Co. v. Risjord*, supra, in an appropriate case. The Ninth Circuit, in *United Sewerage Agency of Washington County, Oregon v. Jelco, Inc.*, 49 LW 2782 (9th Cir. 1981), held that mandamus may issue when the harm suffered by a litigant is greater than the harm suffered by an ordinary litigant forced to wait until the end of the trial before challenging the order of the court. The Court in that disqualification appeal stated:

> Any advantage the [law firm sought to be dis-

> qualified] possesses as a result of the Jelco representation could be put to use at trial. Information once used or exposed would not be forgotten and could be used against Jelco on retrial. More important, the public perception of the profession could be damaged.
>
> 49 LW 2782.

The Sixth Circuit, in *Melamed v. ITT Continental Baking Company*, 592 F.2d 290 (6th Cir. 1979) endorsed the use of a petition for mandamus in lawyer disqualification cases where irreparable harm would result if the suit progressed without a decision of the disqualification issue. This statement was cited with approval in the Eighth Circuit's decision in *In re Multi-Piece Rim Products Liability Litigation*, 612 F.2d 377, 378. Mandamus should have issued because of the irreparable harm which the petitioner would suffer if the United States Attorney's Office for the Western District of Tennessee is allowed to continue their prosecution of the petitioner.

The Sixth Circuit should have accepted jurisdiction over the final order to rule on the merits of the case.

CONCLUSION

The decision of the Sixth Circuit Court of Appeals which denied jurisdiction of the petitioner's appeal and which allowed the United States Attorney's Office for the Western District of Tennessee to continue to prosecute this case presents two significant issues which the Court should address. For the above reasons, this Court should grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that two copies of the foregoing have been forwarded by United States Mail, postage prepaid, to the following counsel of record:

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Appendix

APPENDIX "A"

ORDER OF THE DISTRICT COURT

Filed: December 24, 1980

This case involves further and continued problems and difficulties with respect to proceeding to a trial and a further trial of defendants, alleged co-conspirators and involved in a fraud pertaining to an airplane or airplanes owned by the late Elvis Presley. It is now scheduled to be tried again on January 5, 1981. Within a month of trial, counsel for defendants have now raised the question — should all the persons in the Office of the United States Attorney for the Western District of Tennessee, be disqualified from trying the case because Phil M. Canale, Jr., formerly lead counsel for Caggiano, one of four co-defendants and an alleged co-conspirator, at the first trial, is now associated with the said United States Attorney's Office?

The question is not easily resolved and has but few close precedents this Court has been able to discern. The Court has conducted a hearing on the motion to disqualify and has now considered the affidavits and the memoranda adduced by the defendants and by the United States.

Mr. Canale, previously for many years the Shelby County Attorney General in charge of prosecution of state criminal charges in this most populous County in Tennessee, represented Caggiano in a four-week jury fraud trial in 1978, resulting in conviction of one defendant, acquittal on some counts for some defendants, and a mistrial because the jury could not agree as to several counts on the remain-

ing defendants, including Mr. Caggiano who happens to be a practicing attorney from the Boston, Massachusetts area. Already delay has occurred in a re-trial following that first trial because of double jeopardy issues now resolved after appeal. A new defendant has been added on a superseding indictment. All are charged as co-conspirators, and all now seek disqualification, because they say common strategy and confidences were discussed with Mr. Canale before and during the first trial, and subsequent to the first trial after the November, 1978 superseding indictment was issued involving Winfield for the first time as an indicted defendant.

Exactly what particular confidential information was revealed to Canale and the precise prejudice involved has not been detailed, but defendants claim they should not be put to the "Hobson's choice" of revealing those matters even to the Court to the detriment of their respective interests. Winfield's lawyer, for instance, claims by affidavit that Canale "has material knowledge relative to the defense of this co-defendant." Baszner claims defense strategies were discussed by his counsel and Canale, and points out that the latter represented his interests for a day or two while the jury was deliberating, and, finally, when it indicated it could not reach a decision on all counts as to all defendants, in the discussion about declaring a mistrial.

From what has been submitted and the opportunity to be heard on this motion, the Court is satisfied that there has been no showing by defendants of any actual prejudice to them by any revelation, direct or indirect, intended or unintentional, of information by Canale bearing upon their defenses, their strategies or their confidences. As to all defendants, except Winfield, the record itself bears out

what their sworn testimony has been about the case and what their trial strategy has been. That information is now a public record. Of course, special concern would exist as to Caggiano about whether any attorney-client confidence might somehow, even by sheer inadvertence, come to the attention of the prosecutor in this case, Assistant United States Attorney Dycus.

Several state cases have dealt with this precise problem and they have come to opposite conclusions. In *State v. Latigue*, 108 Ariz. 521, 502 P.2d 1340 (1972), the Supreme Court of Arizona (*en banc*) considered two questions:

> "(1) Where a Deputy Public Defender, who acted as co-counsel for the defendant, received confidential communications from the defendant and had access to all records and information pertaining to the defense, subsequently becomes Chief Deputy County Attorney for Maricopa County, should the Maricopa County Attorney's Office be precluded from prosecuting that individual?"
>
> "(2) If the Maricopa County Attorney's Office is precluded from prosecuting the defendant, should an independent authority be appointed to prosecute and should such authority be denied access to any evidence obtained by the County Attorney's Office?"

The attorney there involved with the potential of conflict of interest was "more than a mere assistant — he is the County Attorney's Chief Deputy, and as such, he has supervisory powers and duties over the Assistant County Attorney who is prosecuting." 502 P.2d 1342.

The Arizona court determined that the answers to

these questions should be "yes" to avoid any appearance of impropriety, and the court noted it was not resting its decision on the particular internal position of the chief deputy involved. That same year the Alabama Court of Criminal Appeals came to a different conclusion that the entire district attorney's staff should not be disqualified merely because the district attorney had interviewed the defendant while he had been with the public defender's office. The court observed that there was no evidence the district attorney had discussed the matter with his staff member prosecuting the case. *Hannon v. State,* 48 Ala. App. 613, 266 S.2d 825 (1972).

New Mexico next had a similar problem to handle — an assistant district attorney handled the defense in a drug case of a defendant and the case ended in mistrial. Before the second trial, the appointment as prosecutor took place (as in the instant situation). Taking note of Louisiana cases[1], and *Hannon v. State, supra,* the New Mexico Court of Appeals declined to follow their reasoning and opted for the rationale of *State v. Latigue, supra,* holding that the entire staff of the District Attorney's Office should be precluded from engaging in the second trial. *State v. Chambers,* 86 N.Mex. 383, 524 P.2d 909 (1974). As observed by the New Mexico Court, a different result would have obtained in Louisiana. A similar set of circumstances there occurred — an assistant district attorney joined the prosecution staff after representing one of many defendants at the first trial in which a conviction on participation in a riot resulted but was subsequently on appeal set aside. In addition, other members of the District Attorney's staff

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[1]**State v. Brazile,** 231 La. 90, 90 S.2d 789 (1952); **State v. Brown,** 274 S.2d 381 (La. 1973).

had worked for the public defender's office while it was handling the defendants' case. There was, as here, no proof that any confidential matter was passed to those actually handling the prosecution. The overruling of a motion to recuse the entire staff was affirmed by the Louisiana Supreme Court in *State v. Bell*, 346 S.2d 1090 (La. 1977), *citing* the authority noted in footnote 1 and *Hannon, supra*. A Tennessee court cited the latter authority with approval in holding that the action of a state trial judge had been correct in overruling defendants' motion for dismissal and for recusal of the district attorney's office under circumstances where it appeared that a young staff assistant may have once interviewed[2] the defendants while serving at the University of Tennessee Legal Clinic on charges which may or may not have been the same robbery charges as were involved in the particular case resulting in their conviction. While this particular assistant participated in a minor way preliminarly [sic] in the prosecution before the trial, the Tennessee Court of Criminal Appeals upheld the action of the trial judge in disqualifying only the staff assistant himself from any further part in handling the case, but also refusing to disqualify the entire district attorney general's staff. *Mattress v. State*, 564 S.W.2d 678 (1977). It was noted, however, that there was "no claim that any one of them ever represented appellants or had any confidential information." 564 S.W.2d 680. *See also Young v. State*, 177 S.2d 345 (Fla. Ct. App. 1965).

Fox v. Shapiro, 375 N.Y.S. 2d 945, 84 Misc. 2d 223 (1975) also holds that an entire prosecutor staff need not be disqualified with the district attorney himself who had

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[2]The assistant had no recollection of the interviews, nor of receiving or giving out any confidential information about the case on trial.

headed the legal aid office which had represented a defendant in the matter later prosecuted by his office. This was so where precautions similar to those taken in the United States Attorney's Office with Canale were followed to isolate the district attorney with respect to prosecution of a case in which he himself was presumptively disqualified. The court noted speedy trial concerns in that case which also concerns this Court in this particular matter before us.

A federal court has also addressed something like the problem to be addressed in this case in *Martin v. United States,* 335 U.S. 945 (9th Cir. 1964). An Assistant United States Attorney in that case had prosecuted a mail fraud charge in which the defendant and other co-conspirators were involved, and it turned out that the prosecutor had previously "appeared as attorney for one of the co-conspirators." When this development came to light, the United States joined defendant appellant's motion for summary reversal, and the United States Attorney's Office in Nevada proceeded to prosecute the defendant a second time; another conviction ensued. In the first trial the particular defendant for whom the Assistant United States Attorney (before his appointment, of course) had acted was severed from the others, and after that trial, the Assistant United States Attorney had severed his connection with the United States. The co-defendants moved for dismissal and/or for a new trial because of the "taint" of the breach of the attorney-client relationship.

With very little discussion except to indicate that appellant co-conspirators were not deprived of a fair trial and that their claims involved hypothesis and conjecture, the *Martin* court overruled their contention. Apparently no motion was ever made to recuse the entire United States

Attorney's office and neither the federal trial or appellate courts on their own motions felt this was necessary. The convictions were affirmed. *See also State v. Minor*, 258 A.2d 815 (Vt. 1969).

In civil cases there is a growing and substantial body of law dealing with disqualification of counsel. Circumstances, of course, are different in civil cases because normally there is an abundance of other counsel available to be of assistance to the party whose choice of attorney has been set aside by reason of disqualification involving some conflict of interest or apparent such conflict. In this criminal case, to the contrary, granting of defendants' motion will work a serious hardship in going forward expeditiously with this trial in an already old case. It will be a tedious and time-consuming process for another attorney to be chosen to prosecute this involved and complicated set of charges. The rule has been expressed and reiterated in civil matters in this Court where a conflict is asserted by a former client:

> It has been repeatedly held that an attorney may not represent a client in litigation against a former client if the subject matter of the litigation is 'substantially related' to work he or she did for the former client. *See e.g. Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562, 565 (2nd Cir. 1968); *Wilson P. Abraham Construction Corp. v. Armco Steel Corp.*, 559 F.2d 250, 252 (5th Cir. 1977); *T. C. & Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265, 268 (S.D. N.Y. 1953).

Melamed v. ITT Continental Baking Co., 592 F.2d 290, 292 (6th Cir. 1979). *See also General Electric Co. v. Valeron Corp.*, 608 F.2d 265 (6th Cir. 1979). Here, there is a substan-

tial relation between the representation of Mr. Canale of defendant Caggiano in this first trial and the office with which he is now associated prosecuting that defendant and others on the same charges against which Canale defended at trial and in brief on appeal. In civil cases, the entire firm has been disqualified where conflict of interest and substantial relation has been found as to a lawyer member of the firm despite efforts to insulate or isolate him as to any confidential information that may or might have been obtained in prior representation. If the civil-criminal analogy is proper, the courts have been inclined to resolve the doubt in favor of disqualification even when no specific showing of actual prejudice has been established. *See Novo Therapeutisk v. Baxter Travenol*, 607 F.2d 186 (7th Cir. 1979).

Defendants in this case have not shown actual prejudice, nor that any breach of confidence has actually occurred. The appearance of impropriety, however, is a matter of concern to this Court as it has been to others considering this difficult question. Having a substantial doubt, then, and wishing to avoid a lengthy trial that could be determined on appeal to be a tainted one, the Court with considerable reluctance grants the Caggiano motion that the United States Attorney's Office state for the Western District of Tennessee be disqualified from proceeding to prosecute him so long as Mr. Canale remains a member of the United States Attorney's Office here. The motion of Baszner also presents a serious problem which should be resolved prior to going forward to a lengthy trial as to him. Mr. Canale's representation of his interests was nominal, minimal and of no real consequence so far as revealing strategy and confidences are concerned.

In sustaining the motion, this Court goes on record nevertheless, to observe that it appears that Mr. Canale, an experienced attorney of high repute in this community, Mr. Cody, the United States Attorney, and the prosecutor, Mr. Dycus, have persuaded this Court that each acted in good faith and that no breach of confidences as to any defendant has occurred based on the proof before us. This is a case of first impression apparently in this Circuit. *Manuel v. Salisbury,* 497 F.2d 388 (6th Cir. 1974) involves a related issue in which a habeas corpus applicant had been unable to demonstrate more than an "inadvertent" conflict and no actual disclosure of confidences. No member of the prosecutor's former firm actually defended the complaining part at the trial and this was noted particularly by two panels of the Sixth Circuit who considered that matter. 497 F.2d 389, 446 F.2d 456 (1971).

We grant defendant Caggiano's motion reluctantly, but we overrule the motion of the other defendants because there is no showing that their interests are actually prejudiced, and they have no actual attorney-client relationship that has been violated,[3] or may have been violated. Because of the uncertainties involved in going forward to trial of co-conspirators, as well as the uncertainty as to Wolfson's physical status, the trial date will be rescheduled to a later date. We note that defendants and their counsel have waived any claim of speedy trial violation under these circumstances, and the time involved in any appeal from this Order would be considered excludable time. This would appear to be a final decision and subject to an immediate appeal under 28 U.S.C. §1291 and/or a

[3]We do not consider Baszner's confidences to have been revealed to Canale, nor is there any presumption that they had been.

proper subject for certification of a controlling question of law under 28 U.S.C. §1292(b). If appeal were taken, it is hoped it may be taken and heard on an expedited basis for guidance of the Court (and the office of the United States Attorney for the Western District of Tennessee) in proceeding further. Of course, the United States Attorney's Office and Mr. Dycus are not disqualified from handling any appeal from this decision relative to Caggiano. *See Melamed v. ITT Continental Baking, supra,* and *General Electric v. Valeron, supra.*

It is so ORDERED this 24th day of December, 1980.

/s/ Harry W. Wellford, Judge
United States District Court

APPENDIX "B"

Nos. 81-5002, 81-5021, 81-5022, 81-5182

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

GABRIEL ROBERT CAGGIANO,
Defendant-Appellee
(81-5002),

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RAYMOND BASZNER (81-5021),
NIGEL WINFIELD (81-5022),
Defendants-Appellants.

RAYMOND BASZNER,
Petitioner,

v.

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF TENNESSEE,
WESTERN DIVISION, AT MEMPHIS, (81-5182),
Respondent.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

Decided and Filed September 17, 1981

Before WEICK and KEITH, *Circuit Judges*, and PORTER, U. S. District Judge.*

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*Honorable David Porter, Senior District Judge for the Southern District of Ohio, sitting by designation.

WEICK, Circuit Judge. The Government has appealed to this court under 28 U.S.C. §1291 from an order of the district court granting the motion of the defendant Gabriel Robert Caggiano, filed in a 1977 criminal case to disqualify the entire United States Attorney's Office in Memphis, Tennessee, consisting of many lawyers because of an alleged appearance of a conflict of interest of only one of the Assistant United States Attorneys in said office. Defendants Baszner and Winfield have appealed to this court from an order of the district court denying their motion to disqualify the entire United States Attorney's Office in Memphis, Tennessee, because of an alleged conflict of interest of one of the assistants employed in the office and said defendants have also filed a petition in this court for a writ of mandamus to compel the district court to grant their motion to disqualify. By order of this court, all of the appeals which were timely filed, and the mandamus proceeding, were consolidated for argument and have been briefed and orally argued.

This is the second appeal in this unduly prolonged case which was first tried to a jury that was unable to agree upon a verdict and the court declared a mistrial. The defendants then filed a motion to dismiss the indictment claiming double jeopardy which motion was denied by the court. On appeal, we affirmed by order. *United States v. Caggiano,* Case Nos. 79-5281, 79-5282 (6th Cir. June 13, 1980).

Appellee Caggiano, joined by Baszner and Winfield, contends that we have no jurisdiction to hear the government's appeal asserting that no final appealable order had been entered. Baszner and Winfield contend that the order denying their motion to disqualify is a final appealable

order and in any event, we have jurisdiction in mandamus. In other words, while Baszner and Winfield are claiming that an order granting a motion to disqualify is not a final order as to the government, they assert that an order denying a motion to disqualify is final as to them.

For the foregoing reasons and those which follow, we hold that the order granting the motion to disqualify is final as to the government and it has the right to appeal under §1291 and that we have no jurisdiction to hear the appeals of the defendants, other than Caggiano.

We are of the opinion that the district court erred in disqualifying the entire office of the United States Attorney and we therefore reverse.

I.

On October 13, 1977, a federal grand jury sitting in the Western District of Tennessee, returned a multicount indictment charging Gabriel Caggiano, an attorney at law, (appellee in Case No. 81-5002), Raymond Baszner (appellant in Case No. 81-5021 and petitioner in Case No. 81-5182), and four other co-defendants with mail and wire fraud, interstate transportation of stolen and fraudulently obtained property, and conspiracy to commit these offenses. The indictment arose out of a complex series of transactions, the object of which was allegedly to defraud Elvis Presley out of a jet airplane or airplanes.

Following a number of pretrial motions filed by the defendants, the trial of Caggiano, Baszner, and a co-defendant commenced on August 21, 1978.[1] The case went

[1]Prior to trial, two co-defendants — Phillip Kitzer, Jr., and Frederick Pro — entered pleas of guilty. Trial of the remaining co-defendant, J. Lawrence Wolfson, had been severed.

to the jury on September 7, 1978, and on September 11, the jury announced that it had found Baszner not guilty on three counts but was hopelessly deadlocked on the remaining counts, as it also was on all counts relating to Caggiano. The co-defendant was found guilty on three counts and not guilty on all other counts. Upon request of Caggiano and Baszner, the district court declared a mistrial.

In November of 1978, a grand jury returned a superseding indictment which named, *inter alia*, Caggiano, Baszner, and Nigel Winfield (appellant in Case No. 81-5022) as defendants. Within the next nine months, defendants either individually or collectively filed a myriad of motions, including motions by Caggiano and Baszner to dismiss the indictment premised on a claim that retrial would place them twice in jeopardy for the same offense.[2] The latter motions were overruled, and an interlocutory appeal followed to this court with the result as before stated. They all operated to delay the criminal case which in 1981 is not yet ready for the second trial.

In May of 1980, while the appeals were pending, Mr. Phil Canale, Jr., Esq., accepted a position as an Assistant United States Attorney for the Western District of Tennessee. Mr. Canale, along with Mr. Edward Kizer, Esq., had represented Caggiano during the first trial and during the preliminary stages of his defense to the second indictment, though the extent to which Canale assisted in Caggiano's defense following the mistrial is not altogether clear and is the subject of some dispute.

By order of June 13, 1980, this court affirmed the

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[2]Docket sheets from the district court indicate that no fewer than 32 defense motions were filed during this period, exclusive of any motions filed by co-defendant J. Lawrence Wolfson.

district court's rulings on the motions to dismiss the indictments.[3] Shortly after receipt of the court's mandate, the district court, on October 15, 1980, scheduled trial of the case for January 5, 1981. On November 25, 1980, Baszner moved to disqualify the entire United States Attorney's Office for the District because of an alleged conflict of interest of one of its many attorneys. Caggiano joined in Baszner's motion on December 15, filing in addition a motion to dismiss for want of a Speedy Trial. Three days later, Winfield too moved to disqualify the United States Attorney's Office.

A hearing was held on the motions at which the district court considered the affidavits submitted by each of the defendants in support of their motions as well as affidavits submitted by the government in response. The hearing provided an opportunity for Caggiano and the other appellants, Baszner and Winfield, to offer evidence, but they offered only the affidavits. These affidavits provide in essence as follows:

Caggiano — In an affidavit filed December 18, 1980, Caggiano states that he retained Canale in November of 1977. Canale had acted as lead counsel during the initial trial and had assisted in formulation and preparation of the interlocutory appeal to this court on the double jeopardy issue. He states that as of August 20, 1979, he had paid Canale in excess of $25,000.

On March 18, 1980, while his interlocutory appeal was pending before this court, Caggiano states that he first learned of the possibility that Canale would accept employ-

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[3]**United States v. Caggiano, Case Nos. 79-5281, 5282 (6th Cir.), cert. denied sub nom., United States v. Baszner, ___ U.S. ___, 101 S.Ct. 226 (1980).**

ment in the United States Attorney's Office. He asserts that he had been assured Canale would continue to represent him regardless of any appointment to the United States Attorney's Office. By letter of May 14, 1980, Caggiano learned that the possibility had come to pass, that Canale had received an appointment and would be sworn in on May 16, 1980. In that letter, Canale informed Caggiano that Mr. Kizer would handle oral argument on the appeal, scheduled for June 4, 1980.[4] Nonetheless, it is alleged that Canale suggested that he might still be able to represent Caggiano in other aspects of the case.

Canale, according to Caggiano's affidavit, accepted a $500 check on May 20, 1980, as payment for his services and expenses relative to the appeal. Further, on July 9, 1980, Caggiano sought, and was given, Canale's advice as to whether he should petition the Supreme Court for a writ of certiorari. It was not until October 28, 1980, that Canale told Caggiano during a telephone conversation that he no longer could represent him.

Baszner — Baszner filed a single affidavit in support of his motion. In that affidavit, Baszner alleges that he and his attorney, Mr. Vincent Flynn, Esq., had met Mr. Canale and Mr. Kizer several times before and during the initial trial. As a result of those meetings, Canale had become privy to confidential information and strategy relating to his defense.[5] Further, Baszner alleges, Canale had repre-

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[4]As earlier indicated, Mr. Kizer had participated in Caggiano's defense during the first trial. Until Canale's appointment to the United States Attorney's Office, Canale and Kizer were members of the law firm of Canale, Walsh, Kizer & Gaerig.

[5]Both Baszner and Winfield have refused to disclose either to the district court or this court the nature of the alleged confidential information or elements of defense strategy revealed to Canale.

sented him during the final stages of the initial trial. Specifically, Canale on behalf of Caggiano and Baszner, had joined in a motion for a mistrial and renewed an earlier motion for a judgment of acquittal when Baszner's attorney was absent during jury deliberations on September 8 and 11, 1978.

Winfield — Winfield's motion was supported by the affidavit of his attorney, Mr. Robert F. Collins. Mr. Collins, according to his affidavit, met Canale at various times in the months prior to Canale's appointment and "[d]uring these meetings, various defense tactics and strategy were discussed, evidence was considered and discussed and exchanged between us as counsel for the co-defendants in this cause, and . . . [Canale] has material knowledge relative to the defense of[Winfield]."

The government — The government responded to the defendants' supporting affidavits with six affidavits of its own: two by Mr. Michael Cody, United States Attorney for the Western District of Tennessee; two by Mr. Joe Dycus, an Assistant United States Attorney who had represented the government during the first trial and who had been assigned to the prosecution of the defendant on the superseding indictment; and two by Canale.

In his affidavits, Mr. Cody states that he did not "solicit" Canale; rather, Canale approached him. Canale was hired because of his "excellent reputation as an attorney of unquestioned integrity and because of his maturity." (Canale had served as District Attorney General for Shelby County, Tennessee from 1955 to 1974).

Cody denies ever having talked with Canale about the instant case other than to specifically inform him that he

would not be allowed to further represent Caggiano. Cody further alleges that

> [S]ince Mr. Canale became an Assistant United States Attorney, it has been a policy of this office that Mr. Canale and Mr. Dycus [the only attorney in the office working on the case] would not discuss this case and that Mr. Canale would be exposed to nothing concerning this case. To the best of my knowledge, information and belief since Mr. Canale became an Assistant United States Attorney: (1) neither Mr. Dycus, nor Mr. Canale has discussed this case with each other; (2) no other attorney or any other person employed by this office or the Department of Justice has discussed this case with Canale; and (3) Mr. Canale has not been privy to or exposed to any information in this office or the Department of Justice concerning this case. This office and the Department of Justice will continue to make sure that Mr. Canale is not exposed to any information concerning this case and that he does not discuss the case with anyone in this office or the Department of Justice.

Mr. Joe Dycus, in his two affidavits, states that he had been assigned to the case since September of 1977. He presented the matter to both grand juries, handled all pretrial work before the first trial, represented the government during the first trial, and prepared the case for trial on the "two or three occasions" when it had been set after the first trial. He has interviewed and is "conversant" with every witness for the government. Dycus further states that he is "intimately familiar" with the facts and docu-

ments in this case, including the transcript of the first trial of over seventeen volumes.

As a result of his knowledge of the case, Dycus states, it is doubtful that Canale could reveal anything to him that he does not already know. In any event, it was agreed when Canale joined the Office that Canale would not be allowed to talk to anyone in the Office about the case. Since that time, Dycus has not discussed the case with Canale, and, to the best of his knowledge, no one else in the Office or in the Department of Justice has discussed the case with Canale. Dycus pledges to never discuss the case with Canale or to provide Canale access to any of the files and records of the case. He further states that he "thoroughly and honestly" believes Canale will not attempt to discuss the case with anyone.

Canale, in his affidavits, states that he applied for the position of Assistant United States Attorney, that he was not solicited or "sought out" by Cody. He swears also that, since his appointment, he has not talked about the case with anyone in the United States Attorney's Office. Further, Canale advised Caggiano upon his appointment that he could no longer represent him. He also advised Kizer, Canale's former law partner, and Caggiano's co-counsel during the initial trial,[6] to also convey to Caggiano the fact that Canale could not represent him any longer. Canale admits, however, that after his appointment Caggiano twice called him long distance to discuss the case, and during those conversations, he answered Caggiano's questions "out of a feeling of professional and personal courtesy."

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[6]Kizer was Caggiano's counsel of record when the motion to disqualify was filed. He has since been granted leave to withdraw.

After considering the affidavits and arguments of the parties, the district court determined that no defendant had made any "showing of any actual prejudice to [him] by any revelation, direct or indirect, intended or unintentional, of information by Canale bearing upon their defenses, their strategies or their confidences." The court also was persuaded that Canale, "an experienced attorney of high repute," and Cody each "acted in good faith and that no breach of confidences as to any defendant has occurred." These findings, in our opinion, are supported by substantial evidence and are not clearly erroneous. Nonetheless, the court expressed "concern" over the "appearance of impropriety." Based on that concern, and the desire "to avoid a lengthy trial that could be determined on appeal to be a tainted one," the court granted Caggiano's motion with "considerable reluctance." The district court denied Baszner's and Winfield's motions, however, since neither had enjoyed a genuine attorney-client relationship with Canale and since neither had shown any prejudice.

II.

The Order Disqualifying The Entire Office Of The United States Attorney For Mere Appearance Of Conflict Of Interest Of One Of Its Many Attorneys Is Immediately Appealable Under 28 U.S.C. §1291.

The weight of authority is that in civil cases an order granting a motion to disqualify is immediately appealable as a final order under §1291 while an order denying a motion to disqualify is not appealable under §1291. *General Electric Co. v. Valeron Corp.*, 608 F.2d 265 (6th Cir. 1979),

cert. denied, 445 U.S. 930 (1980), and *Armstrong v. McAlpin*, 625 F.2d 433, 440-441 (2nd Cir. 1980) (en banc) *vacated on other grounds*, —— U.S. ——, 101 S.Ct. 911 (1981), holds that orders granting disqualification are appealable and *Firestone Tire & Rubber Co. v. Risjord*, 101 S.Ct. 669 (1981), holds that orders denying such motions are not appealable under §1291. See cases collected in United States Code Service 28 U.S.C. §1291, Note 72, entitled Disqualification of Counsel and Note 72 in its May 1981 Cumulative Supplement.

As to orders in criminal cases, in *Carroll v. United States*, 354 U.S. 394, 403 (1957), the Supreme Court stated:

> It is true that certain orders relating to a criminal case may be found to possess sufficient independence from the main course of prosecution to warrant treatment as plenary orders, and thus be appealable on the authority of 28 U.S.C. §1291 without regard to the limitations of 18 U.S.C. §3731 . . .

In *United States v. Calandra*, 455 F.2d 750 (6th Cir. 1972), we held that an order entered in an independent plenary proceeding is appealable by the government under §1291. We relied on *United States v. Wallace & Tiernan Co.*, 336 U.S. 793 (1949), and *Cogen v. United States*, 278 U.S. 221 (1929).

In *United States v. United States District Court, Etc.*, 645 F.2d 7 (6th Cir. 1981), we held that the government could appeal under §1291 from an order of the district court granting defendant's motion to reduce his sentence in a criminal case.

It is obvious that 18 U.S.C. §3731 providing for appeals from certain orders and decisions by the government in criminal cases has no application to the present case. There is nothing in this statute or in its legislative history which inhibits appeals under §1291 where applicable and as held by decisions hereinafter set forth.

In *United States v. Cowan,* 524 F.2d 504 (5th Cir. 1975); *cert. denied, sub nom., Woodruff v. United States,* 425 U.S. 971 (1976), the government, in an opinion written by Judge Murrah, was permitted to appeal under §1291 from an order of the district court denying the motion of the United States Attorney under Rule 48(a) to dismiss criminal proceedings and appointing private special prosecutors to continue prosecuting the case. In reviewing the merits, the court held that the district court had abused its discretion in entering the order denying the government's motion and in appointing a private special prosecutor to replace the United States Attorney.

The decision of the Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949), is applicable here. It was recently applied by the Supreme Court in *Firestone Tire & Rubber Co. v. Risjord, supra,* 101 S.Ct. 669 (1981). Justice Marshall, who wrote the opinion for a unanimous court stated *inter alia*:

> Our decisions have recognized, however, a narrow exception to the requirement that all appeals under §1291 await final judgment on the merits. In *Cohen v. Beneficial Industrial Loan Corp., supra,* we held that a "small class" of orders that did not end the main litigation were nevertheless final and appealable pursuant to §1291.

Cohen was a shareholder's derivative action in which the Federal District Court refused to apply a state statute requiring a plaintiff in such a suit to post security for costs. The defendant appealed the ruling without awaiting final judgment on the merits, and the Court of Appeals ordered the trial court to require that costs be posted. We held that the Court of Appeals properly assumed jurisdiction of the appeal pursuant to §1291 because the District Court's order constituted a final determination of a claim "separable from, and collateral to," the merits of the main proceeding, because it was "too important to be denied review," and because it was "too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.*, at 546. *Cohen* did not establish new law; rather, it continued a tradition of giving §1291 a "practical rather than a technical construction." *Ibid.* See, *e.g.*, *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 413-414 (1926); *Bronson v. LaCrosse & Milwaukee Railroad Co.*, 2 Black 524, 530-531 (1863); *Forgay v. Conrad*, 6 How. 201, 203 (1848); *Whiting v. Bank of the United States*, 13 Pet. 6, 15 (1839). We have recently defined this limited class of final "collateral orders" in these terms: "[T]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay, supra*, at 468 (footnote omitted). See *Abney v. United States*, 431 U.S. 651, 658 (1977).

The order of the district court disqualifying the entire Office of the United States Attorney was a final determination of the claim. The United States Attorney's Office, whose duty it was to prosecute criminal actions in the district, was finally precluded from performing its statutory obligations. The claim was "separable from, and collateral to" the merits of the main proceeding and was "too important to be denied review" and was "too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

Unlike a private attorney, the United States Attorney's Office ought not to be required to disobey the order of the court and subject itself to contempt charges in order to obtain appellate review of the district court's order. Such conduct would only have engendered public disrespect of the United States Attorney's Office which it ought never to be required by law to endure. It is the sworn duty of law enforcement agencies to obey the law. For them to disobey the law will never be tolerated.

We now reach the merits of the case. In disqualifying the entire United States Attorney's Office, the district court in its ruling impliedly relied on Disciplinary Rule 5-105(D) of the ABA Code of Professional Responsibility as that Rule was relied on in the defendant's motions to disqualify. There is, of course, quite a difference in the relationship between law partners and associates in private law firms and lawyers representing the government. The ABA Committee on Professional Ethics recognized there are substantial reasons against treating the government as a private enterprise in its Formal Opinion 342, 62 A.B.A.J.

517 (1976). The Committee discussed the situation similar to this case where a lawyer leaves a private practice for government service. The Committee ruled that other government lawyers in the office are not disqualified from handling matters in which their new associate was involved in his former practice. The Committee stated:

> When the disciplinary rules of Canons 4 and 5 mandate the disqualification of a government lawyer who has come from private practice, his governmental department or division cannot practicably be rendered incapable of handling even the specific matter. Clearly, if DR 5-105(D) were so construed, the government's ability to function would be unreasonably impaired. Necessity dictates the government action not be hampered by such a construction of DR 5-105(D). The relationships among lawyers within a government agency are different from those among partners and associates of a law firm. The salaried government employee does not have the financial interest in the success of departmental representation that is inherent in private practice. The important difference in the adversary posture of the government lawyer is recognized by Canon 7: the duty of the public prosecutor to seek justice, not merely to convict, and the duty of all government lawyers to seek just results rather than the result desired by a client. The channeling of advocacy toward a just result as opposed to vindication of a particular claim lessens the temptation to circumvent the disciplinary rules through the action of associates.

> Accordingly, we construe DR 5-105(D) to be inapplicable to other government lawyers associated with a particular government lawyer who is himself disqualified by reason of DR 4-101, DR 5-105, DR 9-101(B), or similar disciplinary rules.

The Committee concluded that when the individual attorney is separated from any participation on matters affecting his former client, "vicarious disqualification of a government department is not necessary or wise."

Obviously, this Opinion of the ABA Committee was never called to the attention of the district judge as he did not discuss it.

Even prior to the ABA Opinion 342, it was recognized that disqualification of an entire government department, because of a conflict of interest of a government attorney arising from his former employment, would not be appropriate. *United States v. Standard Oil Company,* 136 F. Supp. 345, 363 n. 34 (S.D. N.Y. 1955, Judge Kaufman) (dictum).

As before stated, no prejudice has resulted to anyone in this case and it is time that the long delays from the various maneuvers be brought to a halt and that the case be tried on its merits.

We have no jurisdiction over the appeal of defendants-appellants Baszner and Winfield as the order denying their motion to disqualify from which they appeal is not a final appealable order as to them under 28 U.S.C. §1291. *In re Grand Jury Subpoenas,* 584 F.2d 1366 (6th Cir. 1978), *cert.*

denied, 440 U.S. 934 (1979).[7] This is also an inappropriate case for the issuance of a writ of mandamus and the petition is hereby dismissed.

The judgment of the district court is reversed and the case is remanded for trial.

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[7]In **Firestone Tire & Rubber Co. v. Bisjord**, ____ U.S. ____, 101 S.Ct. 669 (1981), the Supreme Court held that the denial of a motion to disqualify in a civil case was not appealable under §1291 prior to final judgment in the underlying litigation. The Court, however, not having been presented with the issue, expressed no opinion on the question of whether an order denying a motion to disqualify in a criminal case would be appealable under §1291. 101 S.Ct. at 672, n. 8.

We discern no reason why the result should be different in a criminal proceeding. The requirements of §1291 are to be applied in the same manner and, if anything, the policy of avoiding piecemeal and unduly protracted litigation weighs more heavily in a criminal proceeding than it does in a civil action.

APPENDIX "C"

Nos. 81-5002, 81-5021, 81-5022, 81-5182

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

GABRIEL ROBERT CAGGIANO,
Defendant-Appellee
(81-5002),

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RAYMOND BASZNER (81-5021),
NIGEL WINFIELD (81-5022)
Defendants-Appellants.

RAYMOND BASZNER,
Petitioner,

v.

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF TENNESSEE,
WESTERN DIVISION, AT MEMPHIS (81-5182)
Respondent.

ORDER

FILED: October 23, 1981.

Before WEICK and KEITH, *Circuit Judges*, and PORTER, U. S. District Judge.*

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*Honorable David S. Porter, Senior District Judge for the Southern District of Ohio, sitting by designation.

No active judge of this court having requested that a vote be taken on the suggestion that the several petitions for rehearing filed by Appellees Caggiano, Appellants Baszner and Winfield, and Petitioner Baszner, be heard en banc, said petitions for rehearing were then each referred to the panel for determination.

Upon consideration by the panel, we are of the opinion that the issues of these appeals and the proceedings were adequately treated in the opinion which we filed and that said petitions for rehearing are without merit.

It is therefore ORDERED that each of said petitions for rehearing be and they are hereby denied.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman, Clerk

APPENDIX "D"

BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE

Formal Ethics Opinion No. 81-F-5

IF ATTORNEY PRACTICING WITH FIRM REPRESENTING NUMEROUS PLAINTIFFS TRANSFERS TO ANOTHER FIRM ENGAGED IN DEFENDING THE SAME CASES, LATTER FIRM WILL BE DISQUALIFIED

A request has been made for an opinion from an attorney who relates the following facts:

> He shares office space and overhead expenses with two other attorneys, with whom he had a partnership until nine months ago.
>
> The attorney, as well as the former firm, primarily represents personal injury and workmen's compensation plaintiffs.
>
> The attorney now has seven cases pending, some of which he is handling for his former partners.
>
> He desires to join a firm of attorneys in the same city, which practices as defense counsel in personal injury and workmen's compensation cases, and which is defending all seven of the personal injury cases which the attorney has been prosecuting.
>
> The attorney states that, after joining the new firm, he would take no part in any of the cases

which he is now handling, and which that firm is defending.

The proposed move by the attorney would, if consummated, disqualify the new firm from any further participation in any of the cases in which the attorney had been representing the opposite side prior to the move.

DR 4-101 prohibits an attorney from revealing a confidence or secret of his client, using such confidence or secret to the disadvantage of the client, or for the advantage of himself or a third person without the client's consent.

An attorney may not take part in a lawsuit on the opposite side from a former client, where he has obtained, from his former representation, information which might be detrimental to the former client in the later representation; and if the nature of the former matter was such that it would be likely for the former client, in dealing with this attorney about that matter, to have revealed confidential facts related to the later litigation, then the attorney may not participate in such later litigation.

When an attorney is barred from representation on the grounds of knowledge actually or presumably acquired from a former representation, then his entire firm is similarly barred.

Even though the attorney did not participate, with his new firm, in any of the cases which he had previously been handling on the other side, the potentiality of his revealing confidential information to his new partners, and the justifiable apprehension of his former clients that he might do so, would be sufficient to disqualify the new firm.

Compare ABA Formal Opinion No. 134 (1935). See *City of Cleveland v. Cleveland Electric Illuminating Company*, 440 F. Supp. 193, N.C. Ohio (1977); *Aff'd*, 573 F.2d 1310 (CA 6 1977); *General Electric Co. v. Valeron Corp.*, 608 F.2d 265 (CA 6 1979); *Novo Therapeutisk v. Baxter Travenol*, 607 F.2d 186 (CA 7 1979); *Trone v. Smith*, 621 F.2d 994 (CA 9 1980).

This 17th day of April, 1981.

/s/ Randall Burcham
/s/ W. H. Lassiter
/s/ George E. Morrow